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Supreme Court of the United States

No. 749

GARDEN HOMES, INC.,

Petitioner,

—v.—

NORMAN P. MASON, Commissioner,
Federal Housing Administration,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Somerville, Massachusetts
For the Petitioner

INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI

Citation to Opinions Below 1

Jurisdiction 1

Questions Presented 2

The Facts 3

Reasons for Granting the Writ 4

CONCLUSION 8

Appendix A 9

Appendix B 10

Appendix C 14

AUTHORITIES CITED

Cases:

American Fire and Casualty Co. v. Finn, 341 U. S. 6, 9 6

Bee Machine Co. v. Freeman, 131 F. 2d 190 6

Lambert Run Coal Co. v. B. & O. R. Co., 258 U. S. 377 6

Statutes:

12 U. S. C. §1702 et seq. 7
28 U. S. C. 1254(1) 1
28 U. S. C. §1346 5
28 U. S. C. §1442(a) 5
28 U. S. C. §1447(c) 7
40 U. S. C. §§308 and 309 ..... 2, 3, 7

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GARDEN HOMES, INC.,

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—v.—

NORMAN P. MASON, Commissioner,
Federal Housing Administration,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner, Garden Homes, Inc., prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit entered in this case on October 25, 1957.

Citation to Opinions Below

The opinion of the Court of Appeals is reported in 249 F. 2d 71, and is printed in Appendix B hereto (*infra*, pp. 10-13). The District Court entered its orders for dismissal of the action on March 14, 1957 (see record, appendix, case 5262, p. 24). The said judgment is not reported in published reports.

Jurisdiction

The judgment of the Court of Appeals was entered October 25, 1957 (see reported decision in 249 F. 2d 71). The jurisdiction of the Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1) Whether or not the removal of the case from the State Courts was proper in the light of several apparent deviations from the requirements of the laws?

2) Whether or not the Federal Courts should interfere with matters completely within the jurisdiction of the State Courts and which are being adjudicated by said State Court?

3) Should the dismissal, if made, be with prejudice or without?

4) What is the effect of Title 40, U. S. C., Sections 308 and 309?

5) The case should have been remanded.

The Facts

This is an action brought by the plaintiff, ancillary to a bill in equity, pending in the State Courts of the Commonwealth of Massachusetts (see record, appendix, case 5262, pp. 23-24). The said action had been instituted in 1952 but the State Courts of Massachusetts stayed their hands while the U. S. Court for New Hampshire adjudicated certain other matters between the parties. Thereafter, after the U. S. Courts concluded the matters being considered by it, the State Courts of Massachusetts proceeded with the suit 65912 eq. Thereafter, the defendant caused removal of said case to the U. S. Court for Massachusetts. (Case 56-466. Reported in 143 F. Supp. 144.) The said Court ordered said case remanded. The plaintiff, in order to effectuate the doctrine of *lis pendens*, filed an attachment and *caveat* on the Registry of Deeds in Hillsborough County, New Hampshire. The said attachment was by action in the State Courts intended as ancillary to the suit in Massachusetts. The defendant refused to appear even specially before the State Court of New Hampshire but removed the case to the U. S. District Court for New Hampshire. Thereafter, several motions for remand and dismissal were made and either denied or disregarded by the Federal Judge in New Hampshire. The Court assigned the case for trial on a date at which the counsel for the plaintiff was engaged before the Supreme Judicial Court of Massachusetts. As the said counsel was not present, the Court, upon verbal motion of the defendant, entered a dismissal with prejudice. Appeals were duly claimed.

The Court, in order to discharge the said attachment, approved a stipulation filed by the Secretary of the Treasury without the consent of the Plaintiff. This, purportedly under the provisions of Title 40 of the U. S. C.

The Plaintiff, in filing the original writ in court and entering the same, set forth no cause of action which would justify removal. The Court acted without presentation of a motion to amend the action by inserting a declaration. Said motion to amend was filed in the State Courts, but not allowed by the State Courts. After removal it was never offered to the U. S. Courts for allowance. But the Court itself took said motion out of the files and allowed it without prior notice to the plaintiff or opportunity to waive it being given. The details of the facts concerning remand and removal appear more fully in the argument.

Reasons for Granting the Writ

I

The removal was improper:

a) The matters in litigation were being adequately litigated in the State Courts of Massachusetts (see record, appendix, case 5262, p. 23). The said Court had acquired jurisdiction of the *res* by service of process and by *lis pendens* and by attachment. Therefore, interference by the Federal Court removal was improper.

b) There is no Federal issue in the pleadings prior to removal (see writ and state of pleadings at time of entry and removal, record, appendix, case 5110, p. 9). The allowance of the motion to amend was unrequested and done after removal (see record, appendix, case 5110, p. 11).

c) There is no diversity of citizenship. Both the plaintiff and defendant are subjects of the Commonwealth of Massachusetts (see record, appendix, case 5110, p. 17 and p. 25).

d) Removal was not had by reason of diversity of citizenship (see record, appendix, case 5110, p. 25, clause 11).

e) There could be no removal because of the fact that the defendant is a Federal officer under U. S. C., 28 Section 1442(a). The defendant has nothing to do with the collection of the revenue and is not concerned with the apprehension of criminals.

f) The defendant did not submit or become subject to the jurisdiction of the State Courts from which removal was had. In fact, he specifically refused to submit to the said jurisdiction (see docket entries and letter on p. 8 of record, appendix, case 5262).

g) The claim involved more than $10,000.00 and therefore outside the jurisdiction of the District Court under Section 1346 of Title 28 of the U. S. C.

h) No proof or suggestion of conformity with the requirements that removal be made within twenty days of receipt of the original pleading showing the cause of action. The defendant limited his statement in par. 5 of the Petition for Removal to the receipt of certified copy. He had prior thereto received a copy of said declaration and writ more than twenty days before removal.

i) Copies of removal petition were not served upon the plaintiff as required by statute.

j) The discharge of the attachment by the orders of the U. S. Court removed any possibility of the jurisdiction of the Court remaining because of the claim that the *res* was within the jurisdiction of the Court.

k) The action was brought solely as ancillary to the suit pending in Massachusetts (see record, appendix, case 5262, p. 5, par. 6).

l) That the necessary parties to any adjudication were not before the Court (see record, appendix, case 5262, p. 6, par. 11).

m) For the reason of *res judicata* by the United States District Court for the District of Massachusetts in case reported in 143 F. Supp. 144 and for the other reasons stated in the several motions seeking remand filed in the court at New Hampshire and set forth in the record appendices. The main issue raised is the claim that the case was removed without right and improvidently.

It has been said in *Lambert Run Coal Co.* v. *B. & O. R. Co.*, 258 U. S. 377, "If the State Court has no jurisdiction, the federal court acquires none." The defendant specifically refused to submit to the State Court. (see record, appendix, case 5262, p. 8). Therefore, it appears the Federal Court acquired no jurisdiction. See also *Bee Machine Co.* v. *Freeman*, 131 F. 2d 190.

The cause of action is not severable and the contract upon which claim was being made was tripartite. The defendant was one party along with Worcester Federal Savings and Loan Association and the plaintiff. No adjudication could be had without all parties represented and Worcester Federal Savings was not joined in this case, although a party in case 65912 at the State Courts at Boston.

It appears, therefore, that the removal was improvident at least and remand should be required.

II

The case 65912 at the Superior Court at Massachusetts contained all of the issues in litigation between the parties and no fractionation was necessary by removing some of the issues for disposition to the Federal Courts at New Hampshire after the Federal Courts at Massachusetts remanded the case removed from the State Courts of Massachusetts. See *American Fire and Casualty Co.* v. *Finn*, 341 U. S. 6, 9.

III

The dismissal, if at all, should have been without prejudice. There was no trial or determination upon merit by the Court at New Hampshire. The failure of the plaintiff to appear on the date assigned for hearing was caused by the requirement that he appear before the Supreme Judicial Court of Massachusetts. The said requirement can be assumed to have been made weeks before said day. The Federal Court at New Hampshire set the date within a day or two of the trial date itself. No reasonable opportunity to be heard was given by said Court. Therefore, the dismissal should have been, at most, one without prejudice.

IV

Title 40, Sections 308 and 309 cannot contravene the provisions of Title 12, Section 1702 *et seq.* The Court has repeatedly stated that the F. H. A. Commissioner cannot pledge the credit of the United States beyond the specific appropriations made to him by the Congress. The allowance of the motion for stipulation for discharge of attachment (record, appendix, case 5110, pp. 18 and 19) appears beyond the powers of the Court. There does not seem to be any decisions in point on said section of the U. S. C.

V

The provisions of U. S. C., Title 28, Section 1447(c) makes no provision for dismissal of an improperly removed case. It must be remanded. The failure to do so appears error.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

GARDEN HOMES, INC.
By ANGUS M. MACNEIL
Its Attorney
547 Somerville Avenue
Somerville, Massachusetts

January 18, 1958

APPENDIX A

§1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. As amended May 24, 1949, c. 139, §84, 63 Stat. 102.

APPENDIX B

MAGRUDER, *Chief Judge.*

This appeal is taken from a judgment of the United States District Court for the District of New Hampshire, entered upon motion of defendant, ordering the dismissal of a complaint with prejudice. Under Rule 41(b), Fed. Rules Civ. Proc. 28 U. S. C. A., dealing with involuntary dismissal upon motion for failure of the plaintiff to prosecute, it is provided: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." In this case the district court did not specify that the dismissal should be without prejudice.

[1] The complaint, as amended, was filed originally in the Superior Court of Hillsborough County in the State of New Hampshire. It undertook to set forth a claim in the sum of one million dollars for breach of contract against the Federal Housing Commissioner, on a contract made by "the defendant or his predecessors in office" in the course of administration of the National Housing Act, 12 U. S. C. A. §1702 et seq. Incidentally, in the said §1702, the Congress authorizes the Commissioner "in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal." Although appellant suggests in his brief that he is suing the commissioner in his individual capacity (the commissioner individually being a citizen of Massachusetts wherein plaintiff corporation was incorporated), it seems clear that this is not so. The complaint names as defendant "Norman P. Mason of Washington, D. C., as acting Commissioner of the Federal Housing Ad-

ministration." Jurisdiction was obtained by attachment of various lands and tenements of the United States of America held by the Commissioner in Hillsborough County, New Hampshire. The action was in substance one against the United States as the real party in interest. See *United States* v. *Summerlin,* 1940, 310 U. S. 414, 60 S. Ct. 1019, 84 L. Ed. 1283; *Waylyn Corp* v. *United States,* 1 Cir., 1956, 231 F. 2d 544, certiorari denied, 1956, 352 U. S. 827, 77 S. Ct. 40, 1 L. Ed. 2d 49. For further details see our decision on an earlier abortive attempt to appeal from various interlocutory orders in *Garden Homes, Inc.* v. *Mason,* 1 Cir., 1956, 238 F. 2d 654.

The defendant filed a petition for removal of the case to the federal district court. The district court denied various motions by the plaintiff to remand the case to the state court. Finally, by letter to the plaintiff dated February 18, 1957, the clerk of the district court notified plaintiff that the case was set for trial on Monday, March 4, at 11 A.M. at the Federal Building, Concord, New Hampshire, notwithstanding, so the letter recited, that the clerk had received a telephone call from Angus M. MacNeil, Esquire, attorney for the plaintiff, that he could not be present at the trial on March 4. Subsequently the district court relented, and by letter dated February 26, 1957, plaintiff was notified that the trial had been postponed to 11 A.M. on Tuesday, March 5. Still later by letter dated March 1, plaintiff was notified of a second postponement of the trial to 11 A.M. March 6. At the designated hour on March 6, no counsel having appeared for plaintiff, defendant orally moved to dismiss with prejudice under Rule 41, and this motion was granted by the district court. On the afternoon of March 6, the clerk received a letter from Angus M. MacNeil stating that he could not be present at the trial on Wednesday morning, March 6, in Concord because he would be appearing before the Supreme Judicial Court of Mas-

sachusetts. On March 14, the district court entered the formal judgment of dismissal from which this appeal is taken.

[2] Under the circumstances, considering also other instances in the case of failure diligently to prosecute, as pointed out by appellee, we cannot say that the district court abused its discretion in dismissing the complaint.

[3] It is said by the plaintiff that the dismissal should have been without prejudice because the district court lacked jurisdiction of the case. This claim is based first upon the contention that the Superior Court for Hillsborough County did not have jurisdiction and, therefore, that the federal court could not derivatively acquire jurisdiction upon removal. See *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 1922, 258 U. S. 377, 382, 42 S. Ct. 349, 66 L. Ed. 671; *Freeman* v. *Bee Machine Co., Inc.*, 1943, 319 U. S. 448, 449, 63 S. Ct. 1146, 87 L. Ed. 1509. The basis for this contention is allegedly an inadequate service of process. The exact basis is not too clear in the record, but appears to be failure after attachment of the property properly to notify the defendant thereof. This defect, if it existed, is a waivable one, and clearly defendant has waived it.

[4, 5] The second ground upon which plaintiff relied is that even if the Superior Court had jurisdiction, the case was improperly removed and no federal jurisdiction was acquired thereon. We reject this contention.

This is an action involving more than three thousand dollars in which by Act of Congress, in the National Housing Act, 12 U. S. C. A. §1702, the United States has consented to be sued by action against the Federal Housing Commissioner in his official capacity. The action could have been originally brought in the district court under 28 U. S. C.

§1331, and was properly removable under 28 U. S. C. §1441. Also, the complaint discloses a case of diversity of citizenship since plaintiff is a citizen of Massachusetts, and as we said in *Garden Homes, Inc.* v. *Mason,* 1 Cir., 1956, 238 F. 2d 651, 653: "Federal courts have determined that, for purposes of service of process and diversity of citizenship, the Federal Housing Administration is to be treated as a federal corporation and a citizen of the District of Columbia." Furthermore, the Congress has authorized the removal of cases of this sort under 28 U. S. C. §1442(a)(1), "since it was a civil action against an 'officer of the United States or any agency thereof' for an 'act under color of such office'." *Garden Homes, Inc.* v. *Mason,* 1 Cir., 1956, 238 F. 2d 651, 654. See *James River Apartments, Inc.* v. *Federal Housing Administration,* D. C. Md. 1955, 136 F. Supp. 24. See also Hart & Wechsler, The Federal Courts and the Federal System 1147-1148 (1953).

A judgment will be entered affirming the judgment of the District Court.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
CONCORD

OFFICE OF THE CLERK

February 18, 1957

President
Garden Homes, Inc.
547 Somerville Avenue
Somerville 43, Massachusetts

Maurice P. Bois, Esq.
United States Attorney
Concord, New Hampshire

Re: C. 1603, Garden Homes, Inc. vs. Norman P. Mason, Commissioner, Federal Housing Administration

Dear Sirs:

This office in in receipt of a telephone call from Angus M. MacNeil on Saturday, February 16, 1957, saying that he could not be present at trial of the above-entitled case which has been set for Monday, March 4, 1957, at 11:00 A. M. at the Federal Building, Concord, New Hampshire. This case will go on on that date.

Very truly yours,

William H. Barry

William H. Barry
Clerk

WHB/mfl

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
CONCORD

OFFICE OF THE CLERK

February 26, 1957

President
Garden Homes, Inc.
547 Somerville Avenue
Somerville 43, Massachusetts

Maurice P. Bois, Esq.
United States Attorney
Concord, New Hampshire

Re: C. 1603, Garden Homes, Inc. vs. Norman P. Mason, Commissioner, Federal Housing Administration

Gentlemen:

Jury trial of the above-entitled case set for Monday, March 4, 1957, at 11:00 A.M. has been postponed and will be had on Tuesday, March 5, 1957 at 11:00 A.M. at the Federal Building, Concord, New Hampshire.

Very truly yours,

C. Murray Sawyer

C. Murray Sawyer
Deputy Clerk

CMS/mfl

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
CONCORD

OFFICE OF THE CLERK

March 1, 1957

President
Garden Homes, Inc.
547 Somerville Avenue
Somerville 43, Massachusetts

Maurice P. Bois, Esq.
United States Attorney
Concord, New Hampshire

Re: C. 1603, Garden Homes, Inc. vs. Norman P. Mason, Commissioner, Federal Housing Administration

Gentlemen:

Jury trial of the above-entitled case set for Tuesday, March 5, 1957, at 11:00 A.M. has been postponed and will be had on Wednesday, March 6, 1957 at 11:00 A.M. at the Federal Building, Concord, New Hampshire.

Very truly yours,

C. Murray Sawyer

C. Murray Sawyer
Clerk

CMS/mfl

March 5 1957

United States District Court
Concord, N.H.

Dear Sirs;

In accordance with previous advice sent to you I shall be engaged before the full court of the Supreme Judicial Court for the Commonwealth of Massachusetts on Wednesday morning March 6 1957 and will not be able to be present at Concord at this time. On Thursday March 7 1957 I shall be engaged before the Court of Appeals in the latter part of the morning thereby removing all possibility of being present before the United States Court at Concord N.H. at said time.

Very truly yours

A M MacNeil

Received P.M. March 6, 1957